



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA-HQ-OW-2016-0405; FRL-9953-19-OW]

RIN 2040-AF62

Federal Baseline Water Quality Standards for Indian Reservations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The Environmental Protection Agency (EPA) is considering establishing federal baseline water quality standards (WQS) for certain Indian reservation waters to narrow a long-standing gap in coverage of Clean Water Act (CWA) protections. Currently, fewer than 50 of over 300 tribes with reservations have WQS effective under the CWA; most of the reservations with existing CWA-effective WQS have obtained the coverage through treatment in a manner similar to a state (TAS) under CWA section 518. In advance of any potential rulemaking to address this gap of CWA coverage, EPA specifically invites comments on whether to establish such federal baseline WQS for Indian reservation waters that do not yet have WQS under the CWA and, if so, what those WQS should be and how they should be implemented. Federal baseline WQS would define water quality goals for unprotected reservation waters and serve as the foundation for CWA actions to protect human health and the environment. Such WQS, if established, would apply only to those waters not already covered by existing CWA-effective WQS and would be superseded by any WQS subsequently adopted by an authorized tribe and approved by EPA under CWA section 303(c).

DATES: Comments must be received on or before **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. EPA intends to hold two public webinars to discuss the ANPRM during the public comment period. If you are interested, see EPA's Web site at <https://www.epa.gov/wqs-tech/advance-notice-proposed-rulemaking-federal-baseline-water-quality-standards-indian> for the dates and times of the webinars and instructions on how to register and participate.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2016-0405, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

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I. Who may be interested in this ANPRM?

Tribes, states, local governments, and citizens concerned with water quality, and how water quality may be defined and protected on Indian reservations, may be interested in this ANPRM. Entities discharging pollutants to waters of the United States may be indirectly affected by a rulemaking resulting from this ANPRM since WQS are used to develop National Pollutant Discharge Elimination System (NPDES) permit limits and serve as a basis for Clean Water Act

(CWA) section 404 permit decisions. WQS are also the basis for assessing water quality, identifying impaired waters and developing total maximum daily loads (TMDLs) under CWA sections 305(b) and 303(d). Potentially affected entities include:

| Category | Examples of potentially affected entities |
|---------------------------------|---|
| States, Tribes, and Territories | Tribes currently without CWA-effective WQS and tribes and states near or bordering Indian reservations that do not have WQS effective under the CWA. |
| Federal Agencies | Federal agencies with projects or other activities near surface waters on Indian reservations. |
| Industry | Industries discharging pollutants to surface waters on Indian reservations, or that may affect surface waters on Indian reservations. |
| Municipalities | Publicly-owned treatment works and stormwater outfalls discharging pollutants to surface waters on Indian reservations, or that may affect surface waters on Indian reservations. |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by a potential federal baseline WQS rule resulting from this ANPRM. This table lists the types of entities that EPA is now aware could potentially be affected by such action. Other types of entities not listed in the table could also be affected. If you have questions regarding the effect of this action on a particular entity, please consult the person listed in the preceding “FOR FURTHER INFORMATION CONTACT” section.

II. Background

A. What is the role of WQS under the CWA?

The CWA – initially enacted as the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500) and subsequent amendments – establishes the basic structure in place today for regulating pollutant discharges into the waters of the United States. In the CWA,

Congress established the national objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and to achieve “wherever attainable, an interim goal of water quality that provides for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water” (sections 101(a) and 101(a)(2)).

The CWA establishes the basis for the current WQS regulation and program. Section 301 of the CWA provides that: “the discharge of any pollutant by any person shall be unlawful” except in compliance with specific requirements of Title III and IV of the CWA, including industrial and municipal effluent limitations specified under CWA section 304 and “any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance established pursuant to any [s]tate law or regulation.” Section 303(c) of the CWA addresses the development of state¹ and authorized tribal WQS and provides for the following:

- (1) WQS shall consist of designated uses and water quality criteria based upon such uses;
 - (2) States and authorized tribes shall establish WQS considering the following possible uses for their waters – protection and propagation of fish, shellfish and wildlife, recreational purposes, public water supply, agricultural and industrial water supplies, navigation, and other uses;
 - (3) State and authorized tribal WQS must protect public health or welfare, enhance the quality of water, and serve the purposes of the CWA;
 - (4) States and authorized tribes must review their WQS at least once every three years;
- and

¹“State” in the CWA and this document refers to the 50 states, the District of Columbia, and the five United States territories: the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. “Authorized tribe” refers to those federally recognized Indian tribes with authority to administer CWA WQS program in a manner similar to a state under CWA Section 518.

(5) EPA must review any new or revised state and authorized tribal WQS, and is also required to promulgate federal WQS where EPA finds that new or revised state or authorized tribal WQS are not consistent with applicable requirements of the CWA or in situations where the Administrator determines that federal WQS are necessary to meet the requirements of the CWA.

EPA established regulatory requirements in 1975,² 1983,³ 1991,⁴ 2000,⁵ and 2015⁶ to implement CWA section 303(c), now found in the WQS regulation at 40 CFR Part 131. The WQS regulation includes general provisions, requirements for establishing WQS, procedures for review and revision of WQS, and the text of federal WQS that EPA has promulgated for specific waters of the United States.

CWA-effective WQS are the foundation of the water quality-based pollution control program mandated by the CWA and serve a dual purpose. First, WQS define the goals for a water body by designating its uses, setting criteria to protect those uses, and establishing antidegradation requirements. Second, WQS are a basis for water quality-based limits in NPDES permits (CWA sections 301(b)(1)(C) and 402), as the measure to assess whether waters are impaired (CWA section 303(d)(1)(A)), for assessing and reporting on water quality biannually under CWA section 305(b), and as the target for a TMDL or “pollution budget” to aid in the

² In 1975, EPA established the initial WQS regulation at 40 CFR 130.17. See 40 FR 55334, Nov. 20, 1975.

³ In 1983, EPA established the core of the current WQS regulation by strengthening the previous provisions and moving them to a new 40 CFR Part 131. See 54 FR 51400, November 8, 1983.

⁴ In 1991, EPA added 40 CFR 131.7 and 131.8 to extend the ability to participate in the WQS program to eligible Indian tribes, pursuant to CWA section 518 which was enacted in 1987. See 56 FR 64893, December 12, 1991. See also EPA’s revised interpretation of CWA section 518 (81 FR 30183, May 16, 2016).

⁵ In 2000, EPA promulgated 40 CFR 131.21(c), commonly known as the “Alaska Rule,” to clarify that new and revised WQS adopted by states and authorized tribes and submitted to EPA after May 30, 2000, become applicable WQS for CWA purposes only when approved by EPA. See 65 FR 24641, April 27, 2000.

⁶ In 2015, EPA updated six key areas of the WQS regulation to provide a better-defined pathway for states and authorized tribes to improve water quality, protect high quality waters, increase transparency and enhance opportunities for meaningful public engagement at the state, tribal and local levels. See 80 FR 51019, August 21, 2015.

restoration of impaired waters (CWA section 303(d)(1)(C)). Under CWA section 401, WQS serve as a basis for granting, granting with conditions, or denying state, authorized tribal, or federal certifications for federal licenses or permits for activities that may result in a discharge to waters covered by such WQS.

B. What is the “gap” in WQS protection for waters on Indian reservations?

The federal government has recognized 567 tribes. Over 300 of these tribes have reservation lands such as formal reservations, Pueblos, and informal reservations (*i.e.*, lands held in trust by the United States for tribal governments that are not designated as formal reservations). Under principles of federal law, states generally lack authority to regulate on Indian reservations. *See, e.g., Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 n.1 (1998). EPA has generally excluded such lands from state programs it has approved under the CWA (and other environmental laws administered by EPA).⁷ Thus, state WQS under EPA-authorized state CWA programs generally do not apply on Indian reservations.

In the absence of applicable state or federal WQS, the principal mechanism for establishing WQS for Indian reservation waters has been through the authority provided by CWA section 518. That section provides that, where a tribe is interested in administering the CWA WQS program, the tribe must (a) become authorized and (b) adopt and submit WQS to EPA for approval. To become authorized, the tribe must seek eligibility for TAS – consistent with the requirements of CWA section 518(e) and 40 CFR 131.8. Section 518(e) of the CWA establishes eligibility criteria for TAS, including requirements that the tribe have a governing body carrying out substantial governmental duties and powers; that the functions to be exercised by the tribe pertain to the management and protection of water resources within the borders of an Indian

⁷ As noted in this section, there are a few instances where EPA has approved state WQS for particular reservations based on regulatory authority granted to the state in a separate federal law.

reservation; and that the tribe be reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CWA and applicable regulations. In 1991, EPA issued a final rule to implement CWA section 518(e) for the WQS program. EPA's regulation at 40 CFR 131.8 uses the eligibility criteria contained in CWA section 518 and establishes procedures for EPA Regional Administrators to receive and take action on tribal applications, so they are treated in a similar manner as a state for CWA purposes. To adopt WQS and have them approved by EPA, an authorized tribe must meet the same requirements applicable to states in 40 CFR 131 subparts B and C.

Most of the Indian reservations that are currently covered by CWA-effective WQS involve authorized tribes that have developed and adopted WQS that were approved by EPA (and made effective for CWA purposes). Currently, 53 of the over 300 federally recognized tribes with reservation lands have been authorized to administer a WQS program. Of these authorized tribes, 42 have had their WQS approved by EPA.⁸

Another way to establish CWA-effective WQS for Indian reservation waters is for EPA to promulgate federal WQS on a tribe-by-tribe, reservation-by-reservation basis. EPA has promulgated such federal WQS for one tribe, the Confederated Tribes of the Colville Reservation in Washington. See 40 CFR 131.35 (54 FR 28622, July 6, 1989).⁹ There are also uncommon circumstances where a separate federal law grants a particular state the authority to regulate the environment on an Indian reservation. Where EPA expressly approves such a state's authority and the state's WQS for waters of an Indian reservation, such WQS will apply under

⁸ EPA maintains a current list of authorized tribes and tribal WQS approvals at: <https://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards>.

⁹ When establishing federal WQS for waters of the United States, EPA uses authority provided by the CWA to promulgate federal WQS where the EPA Administrator determines that new or revised WQS are necessary to meet the requirements of the CWA (see CWA section 303(c)(4)(B) and 40 CFR 131.22(b)).

the CWA for those waters. To date, EPA has approved three states (Washington, South Carolina, and Maine) to administer WQS on reservations or parts of reservations of six Indian tribes.

For various reasons, many tribes with reservation lands have been unable to apply, or have chosen not to apply, for TAS to administer a WQS program under the CWA. Some tribes have lacked resources to develop WQS to implement a WQS program while other tribes are focusing on addressing other environmental priorities first. Some tribes may be concerned that they cannot meet eligibility requirements, or that applying for program authorization could raise jurisdictional or other legal issues. Some tribes may have adopted water quality standards under tribal law and believe that such water quality standards are adequate to protect their water resources without being approved under the CWA. However, a tribe must obtain TAS and EPA must approve their water quality standards for those standards to be effective for CWA purposes.

Thus, except for the 42 authorized tribes with EPA-approved WQS in effect, the one instance where EPA has promulgated federal WQS (for the Colville Reservation), and six tribes for which EPA has approved states (Washington, South Carolina, and Maine) to adopt WQS on reservations or parts of reservations, there is a gap in water quality protection under the CWA for waters on Indian reservations.

C. How has EPA tried to address the gap of CWA coverage previously?

Between 1998 and 2003, EPA consulted widely with tribes, states, and others on the possibility of EPA promulgating certain federal WQS referred to as “core WQS” for Indian country waters without CWA-effective WQS. On January 18, 2001, EPA Administrator Carol Browner signed a proposed rule to promulgate the core WQS under CWA section 303(c). On January 22, 2001, EPA withdrew that proposal to allow additional review. Eventually, EPA Administrator Christine Whitman requested that EPA staff conduct additional outreach and

consultation with tribes and states and issue an ANPRM before proposing a core WQS rule.

Between 2001 and 2003, EPA began working on the ANPRM to invite comments and views on a variety of broad, possible approaches for establishing federal core WQS for waters in Indian country. Ultimately, EPA did not issue the core WQS ANPRM, nor did it reissue the proposed rule.

D. Why is EPA publishing this ANPRM?

EPA is publishing this ANPRM to initiate an informed dialogue with tribes, states, the public, and other stakeholders regarding whether EPA should initiate a rulemaking to establish federal baseline WQS for Indian reservations currently lacking such WQS and, if so, what approach EPA should take regarding key policy issues raised by such a rulemaking.

Federal baseline WQS – which could include designated uses, narrative and numeric criteria, antidegradation requirements, and other WQS policies such as a mixing zone policy, a compliance schedule authorizing provision, and a WQS variance procedure – can provide an important tool for tribes and EPA to use in making defensible, site-specific decisions that protect reservation waters. The WQS being considered would provide adequate coverage in each category, as a starting point. To be most effective, CWA-effective WQS should be tailored to the individual circumstances of the authorized tribe and its waters, likely through the development of additional or refined criteria and uses. EPA’s preference is for tribes to utilize the TAS and WQS submittal process to develop such tailored WQS. EPA remains committed to assisting tribes in reaching this goal.

The primary benefit of federal baseline WQS would be to ensure that Indian reservation waters that are without CWA-effective WQS have direct water quality-based protection under the CWA. Many of the CWA’s mechanisms for protecting water quality, such as water quality-

based effluent limits in NPDES discharge permits, rely on WQS as the foundation for water quality-based decisions. Without applicable WQS, these mechanisms may be limited.

This ANPRM seeks input on key issues related to whether and how to fill the gap of WQS coverage in Indian reservation waters. In preparation for this ANPRM effort and consistent with EPA's Policy on Consultation and Coordination with Indian tribes, from August through November 2015 and from June through August 2016, EPA consulted and coordinated with officials from more than 130 tribes from around the United States. During that time, EPA received considerable input from tribal officials, most of it positive and supportive of this effort. EPA plans to continue consultation and coordination with tribal officials to address some of the tribes' questions and concerns, most of which center on implementation of any federal baseline WQS.

As mentioned previously, WQS would inform permit decisions and other implementation actions. Recognizing tribes potentially affected by this effort may have limited resources and experience with WQS development, administration, and implementation, EPA would work with the affected tribal government(s) through opportunities for coordination and consultation, as appropriate, in interpreting and applying any final federal baseline WQS rule.

EPA invites comment from all Indian tribes, especially tribes with reservation land that do not have CWA-effective WQS and members of those tribes, on whether establishing federal baseline WQS is an appropriate step in advancing the federal trust responsibility to federally recognized tribes, and enhancing tribal government sovereignty through protection of reservation water quality. EPA is interested also in any input regarding whether there are any concerns that would warrant not including a particular tribe in any final federal baseline WQS rule. While EPA is considering proposing to apply these WQS to all Indian reservations without CWA-effective

WQS, in order to meet the goals of the CWA and better protect Indian reservation waters, EPA invites comment on other options.

This ANPRM is part of a broader effort to narrow gaps in CWA-effective WQS coverage in Indian country. On May 16, 2016, EPA revised the interpretation of CWA section 518 to streamline the process for tribes to apply for TAS for CWA regulatory programs, including the WQS program.¹⁰ At the same time as EPA considers – through this ANPRM – whether and how to establish federal WQS for waters on Indian reservations, EPA continues to encourage, work closely with, and provide support to eligible tribes that wish to seek TAS and develop their own WQS for approval under the CWA. EPA continues to recognize that the appropriate place for a tribe to fully realize its unique objectives for WQS continues to be through seeking TAS for the purpose of administering WQS under the CWA.¹¹ EPA remains committed to helping tribes navigate the TAS and WQS adoption processes. In practice, implementation of any final federal baseline WQS could also provide individual tribes valuable understanding and experience in how WQS function under the CWA to protect Indian reservation waters.

EPA expects that this reinterpretation of CWA section 518 will better position tribes to seek TAS, establish their own WQS, and facilitate tribal involvement in the protection of reservation water quality as intended by Congress. To help facilitate the TAS application and WQS adoption processes, EPA is developing new guidance, including creating draft TAS applications and WQS language for use by eligible tribes.¹²

¹⁰ See 81 FR 30183 (May 16, 2016).

¹¹ Recognizing the importance of protecting waters on which tribes rely, EPA is also preparing a final rule to establish procedures for tribes to obtain TAS to administer the water quality restoration provisions of CWA section 303(d) to identify impaired waters on their reservations and to establish total maximum daily loads, which serve as plans for attaining and maintaining applicable WQS.

¹² “Eligible tribes” are those tribes that EPA has approved for TAS under the requirements of CWA section 518(e) and 40 CFR 131.8.

EPA expects to continue to provide such support even if EPA were to promulgate any final federal baseline WQS rule. In addition, as described in sections III.A and III.B of this document, EPA would expect that any final federal baseline WQS that may be put in place would no longer apply to the waters on Indian reservations of a tribe once the tribe has been authorized to administer a CWA WQS program and the tribe's own WQS are in place and approved by EPA.

III. What would be included in the federal baseline WQS effort?

EPA seeks input on which components of WQS to include in any federal baseline WQS effort – if it determines that such an effort is necessary – to ensure that the water quality of waters on Indian reservations is protected under the CWA. The range of WQS components that could be included are outlined in 40 CFR Part 131, and include: designated uses, narrative and numeric criteria, antidegradation requirements, and other WQS policies such as a mixing zone policy, a compliance schedule authorizing provision, and a WQS variance procedure. While EPA shares the ultimate goal of having WQS tailored to the particular circumstances of each Indian reservation, given the challenges of such an approach in a national federal rule, tailoring opportunities may be limited. However, where flexibility under the CWA and the national WQS regulation exists, any final federal baseline WQS could allow for actions based on such WQS (*e.g.*, NPDES permitting, TMDLs) to reflect local considerations and consultation with the affected tribe(s).

EPA invites input on how EPA should approach establishing any federal baseline WQS. For instance, should EPA establish one set of WQS that apply universally to the reservation waters covered by any final federal baseline WQS rule? Alternatively, should EPA pursue establishing federal baseline WQS that offer limited tailoring opportunities by establishing cultural and traditional designated uses that account for unique practices observed by particular

tribes (see section III.C of this document), criteria that account for higher fish consumption patterns of particular tribes by establishing human health criteria using a limited range of fish consumption rates (see section III.D of this document), and establish greater protection for high quality and Outstanding National Resource Waters of particular importance to the tribe through the antidegradation provisions (see section III.E of this document)? These components are further discussed below.

In addition, EPA seeks input on whether and how to make any potential federal baseline WQS consistent with the requirements of 40 CFR Part 132. In 1995, EPA published a final rule at 40 CFR Part 132, 60 FR 15366 (March 23, 1995) that implements the CWA section 118 requirement for EPA to publish water quality guidance on minimum WQS, including antidegradation policies, and implementation procedures for the Great Lakes System, and that states and authorized tribes adopt WQS, antidegradation policies, and implementation procedures consistent with the guidance. EPA invites comments on whether any potential federal baseline WQS should ensure that decisions for reservation waters in the Great Lakes System (as defined in 40 CFR 132.2) are consistent with the WQS, antidegradation policies, and implementation procedures for the Great Lakes System in 40 CFR Part 132, in addition to any final federal baseline WQS, even in cases where tribes have not adopted WQS under CWA sections 303(c) and 518.

A. To what waters would the potential federal baseline WQS apply?

In this ANPRM, EPA invites comment on the potential scope of any federal baseline WQS. Such WQS could apply to any or all waters of the United States that are, or after the effective date of a final baseline WQS rule become, located within the exterior boundaries of an Indian reservation except: (1) Indian reservation waters for which EPA has promulgated other

federal WQS; and (2) Indian reservation waters where EPA has expressly found that a tribe or state has jurisdiction to adopt WQS, and tribal or state WQS are effective under the CWA. Consistent with EPA's long-standing approach, waters of Indian reservations would include waters located within the boundaries of Pueblos as well as lands held in trust by the United States for an Indian tribe even if the land has not been formally designated as a reservation. See, e.g., 56 FR 64881 (December 12, 1991); see also *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 505 U.S. 505, 511 (1991); *HRI v. EPA* 198 F.3d 1224 (10th Cir. 2000); *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000).

Indian reservations are a subset of the broader geographic area that comprises Indian country as a whole. Indian country is defined at 18 U.S.C. 1151 as: (a) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

B. Which waters should be excluded from the potential federal baseline WQS?

The objective of any federal baseline WQS would be to address the gap in CWA-effective WQS coverage, but it may be appropriate to exclude from any such WQS areas certain waters where other tribal or reservation-specific CWA WQS apply. EPA invites comments on whether federal baseline WQS, if promulgated, should automatically not apply to the following categories of Indian reservation waters:

- Indian Reservation waters for which EPA has promulgated other, reservation-specific federal WQS. Currently, EPA has promulgated WQS for only one Indian reservation, the reservation of the Confederated Tribes of the Colville Reservation (see 40 CFR 131.35).
- Indian reservation waters where EPA has explicitly found that a tribe or state has jurisdiction to adopt WQS, and the tribe or state has adopted WQS that are in effect for CWA purposes in accordance with EPA's WQS regulation at 40 CFR Part 131. Currently only 42 tribes have such WQS, but more could reach this status in the future. There are also three instances where EPA has approved states to adopt WQS on reservations or parts of reservations of six Indian tribes.

EPA invites comments on the automatic exclusions described in this section and on whether other automatic exclusions should be considered. In addition, EPA invites comment on whether the application of any exclusion to tribes should be immediate once the Regional Administrator or appropriate delegate approves an authorized tribe's own WQS for CWA purposes.

C. What designated uses should be considered in proposing potential federal baseline WQS?

The first key component of WQS is designated uses. EPA's WQS regulation requires states, and authorized tribes, as well as EPA per 40 CFR 131.22(c), to specify goals and expectations for how each water body is to be used. Designated uses communicate to the public a state or authorized tribe's environmental management objectives and water quality goals for its waters. Clear and accurate designated uses are essential in maintaining the actions necessary to restore and protect water quality and meet the requirements of the CWA. EPA's implementing

regulation distinguishes between two broad categories of designated uses: uses specified in CWA section 101(a)(2) and a non-101(a)(2) use. The states and authorized tribes must take these uses into consideration when designating waters. EPA invites comments on which designated uses should be established in any federal baseline WQS and whether and how to differentiate designated uses for different waters on Indian reservations that would be covered by such federal baseline WQS.

For the federal baseline WQS effort, EPA is considering including designated uses consistent with the uses specified in section 101(a)(2) of the CWA. These uses provide for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, including the protection of human health when consuming fish, shellfish, and other aquatic life. Since 1983, EPA's WQS regulation has interpreted and implemented the CWA through requirements that WQS protect these CWA section 101(a)(2) uses unless states and authorized tribes, or EPA by extension, demonstrate that those uses are infeasible to attain through a use attainability analysis consistent with EPA's regulation at 40 CFR 131.10, effectively creating a rebuttable presumption of attainability. Where such uses do not appropriately reflect tribe-specific or site-specific conditions, EPA, in consultation with tribes, could subsequently modify, sub-categorize, or remove such designated uses consistent with EPA's WQS requirements. For more information on CWA section 101(a)(2) uses, please refer to EPA's Water Quality Standards Handbook, Chapter 2 Designated Uses.¹³ EPA requests comment on such an approach and any other alternative approach.

During the tribal consultation process, many tribes stressed the value and importance of protecting water quality at levels appropriate for use in various cultural and traditional activities

¹³ <https://www.epa.gov/sites/production/files/2014-10/documents/handbook-chapter2.pdf>.

of individual tribes. EPA does not anticipate proposing to specifically define what cultural and traditional uses are for purposes of this effort, because they can include a wide variety of uses specific to the ceremonies and traditions of each tribe and require different protections. EPA anticipates that, in some cases, the cultural and traditional uses would be adequately protected under the categories of the CWA section 101(a)(2) uses. For example, full body immersion in the water and other fishing-related cultural or traditional practices may, in some instances, be covered by the CWA section 101(a)(2) uses. However, such practices that require protection of aquatic plants used for basket weaving or water quality for ceremonial washings (uses that tribes suggested be protected during the 2015 consultation and coordination effort) may not be adequately covered by the CWA section 101(a)(2) uses.

Accordingly, EPA seeks input on whether, and if so, how to include protection of specific or general cultural and traditional uses explicitly within the scope of the federal baseline WQS. Such a use designation would be accompanied by water quality criteria sufficient to protect the cultural and traditional uses of the tribe's reservation waters. To protect these types of uses, EPA could rely on a combination of numeric and narrative criteria. EPA, in consultation with tribes, could determine at the implementation stage which criteria are applicable to protect the cultural or traditional uses specific to a tribe's reservation waters. Tribal treaty or other reserved rights to fish, hunt, and/or gather on Indian reservations could generally be encompassed by this designated use, to the extent they are not encompassed by the other CWA section 101(a)(2) designated uses (*e.g.*, a designated use of "fishing" or "fish harvesting" could encompass fish and shellfish consumption, and could also encompass sustenance or subsistence fish and shellfish consumption, depending on the reserved right). EPA seeks comment on the express inclusion of

language designating cultural and traditional uses in the potential federal baseline WQS and any desired impacts of such a designation.

EPA could also propose to designate a public water supply use for Indian reservation waters covered by the potential federal baseline WQS. A public water supply use is a use specified in CWA section 303(c)(2)(A), and is considered by EPA to be a non-101(a)(2) use, which means that it is unrelated to the protection or propagation of fish, shellfish, wildlife or recreation in or on the water. This designation reflects the requirements in CWA section 303(c) and EPA's implementing regulation at 40 CFR 131.10(a) that when states or authorized tribes, and EPA per 40 CFR 131.22(c), are establishing WQS, the waters' use and value for public water supplies shall be taken into consideration, and that WQS protect the public health or welfare, enhance the quality of water, and serve the purposes of the CWA. Inclusion of a public water supply use designation could help to reinforce EPA's objective to establish baseline human health goals that serve as the basis for CWA protection. Many states have established such a use on large numbers of their water bodies, and EPA anticipates that many tribes will similarly desire such a use to be established on some or most of their waters to help ensure safe drinking water. On the other hand, designating a public water supply use for Indian reservation waters could result in a designation on a water body where such a use is not attainable or otherwise not appropriate. In such instances, EPA could provide a mechanism for the tribe or other parties to provide information for EPA to consider in deciding whether to remove that designation.¹⁴ For more information on non-101(a)(2) uses, please refer to EPA's Water Quality Standards Handbook, Chapter 2 Designated Uses.

¹⁴ EPA would remove the designation in a manner similar to how states and authorized tribes can remove such non-101(a)(2) uses in accordance with EPA's regulation at 40 CFR 131.10(k)(3).

EPA is seeking comment on whether the public water supply use is an applicable or suitable use that should be proposed for Indian reservation waters. Options could include not promulgating this use at all for Indian reservation waters, promulgating for all Indian reservation waters, promulgating for some Indian reservation waters, or not promulgating the use for those specific Indian reservation waters identified as unsuitable for such a use prior to finalization of any potential federal baseline WQS rule.

As noted previously, EPA recognizes that it is possible that designated uses set forth in any federal baseline WQS may not ultimately reflect tribe-specific or site-specific conditions or the actual attainability of certain uses. In such circumstances, EPA could subsequently modify, sub-categorize, or remove designated uses that would be established in the potential federal baseline WQS or add additional uses in order to provide limited tailoring of the federal baseline designated uses. This could be accomplished through subsequent federal promulgations consistent with EPA's regulation at 40 CFR Part 131.¹⁵ In undertaking any such modification or tailoring, EPA would expect to work in consultation with tribes to assemble information to develop requisite analyses required by the regulation. EPA could also consider ways to streamline any subsequent federal rulemakings, including "batching" designated use modifications that pertain to multiple tribes and delegating such rulemaking authority to the EPA Regional Administrators. EPA solicits comment on this potential approach to appropriately modifying or tailoring any potential federal baseline WQS to address site-specific issues.

¹⁵ Consistent with 40 CFR 131.10, (1) a revision to a use specified in CWA section 101(a)(2) or a sub-category of such a use requires a use attainability analysis and identification of the highest attainable use and associated criteria; and (2) a revision to a non-101(a)(2) use, such as public water supply, requires a use and value demonstration as described in 40 CFR 131.10(a).

EPA continues to encourage tribes who are interested in establishing WQS that reflect site-specific, tailored designated uses better suited to particular Indian reservations to obtain TAS for WQS and adopt their own WQS for EPA review and approval.

D. What water quality criteria should be considered in proposing potential federal baseline WQS?

EPA's current WQS regulation at 40 CFR 131.11 requires adoption of water quality criteria that protect designated uses. Such criteria must be based on sound scientific rationale, must contain sufficient parameters to protect the designated use, and may be expressed in either narrative or numeric form. (See 40 CFR 131.11(a) and (b)). In adopting water quality criteria, states and authorized tribes should establish numeric values based on CWA section 304(a) criteria, CWA section 304(a) criteria modified to reflect site-specific conditions, or other scientifically defensible methods. (See 40 CFR 131.11(b)). As discussed more fully below, CWA section 303(c)(2)(B) requires states and authorized tribes to adopt numeric criteria for priority toxic pollutants for which EPA has developed CWA section 304(a) recommended criteria. CWA section 304(a)(1) requires EPA to develop and publish, and from time to time update, criteria for water quality accurately reflecting the latest scientific knowledge regarding concentrations of specific chemicals or levels of parameters in water that protect aquatic life and human health. Water quality criteria recommendations developed under CWA section 304(a)(1) are based on sound scientific rationale, are protective of the designated use(s), and are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects. CWA section 304(a)(1) criteria do not reflect consideration of economic impacts or the technological feasibility of meeting the chemical concentrations in ambient water. EPA's regulation at 40 CFR 131.11(b)(2) provides that states and authorized

tribes should also establish narrative criteria where numeric criteria cannot be determined or to supplement numeric criteria. Per 40 CFR 131.22(c), these requirements apply equally to EPA when promulgating federal WQS. Narrative criteria are descriptions of the conditions necessary to attain a water body's designated use, while numeric criteria are values expressed as levels, concentrations, toxicity units or other numbers that quantitatively define the desired condition of the water body.¹⁶ Most state and authorized tribal WQS include both narrative and numeric water quality criteria.

1. Narrative water quality criteria

In considering potential approaches to narrative criteria that could be included in any proposed federal baseline WQS, EPA could look to the Quality Criteria for Water, 1986 ("Gold Book"). EPA could establish a narrative water quality criterion that provides that waters must be free from toxic, radioactive, conventional, non-conventional, deleterious, or other polluting substances in amounts that will prevent attainment of the designated uses specified above. EPA could also establish narrative criteria that provide that all waters must be free from substances attributable to wastewater or other dischargers that: (1) settle to form objectionable deposits; (2) float as debris, scum, oil, or other matter to form nuisances; (3) produce objectionable color, odor, taste, or turbidity; (4) injure or are toxic or produce adverse physiological responses in humans, animals or plants; and/or, (5) produce undesirable or nuisance aquatic life, including excess algae. Such narrative criteria would be considered when identifying the level of protection sufficient to protect any designated uses established in federal baseline WQS, as outlined in

¹⁶ See *EPA's Water Quality Standards Handbook*, Chapter 3, section 3.5.2.
<https://www.epa.gov/sites/production/files/2014-10/documents/handbook-chapter3.pdf>.

section III.C and consistent with 40 CFR 122.44(d), when making WQS implementation decisions. EPA notes that all states have narrative criteria for the protection of designated uses. EPA could also include narrative criteria that are specifically intended to protect a designated use that includes water-based activities essential to maintaining cultural and traditional practices that might not be adequately covered by the numeric criteria included in the federal baseline WQS. For example, during consultation with EPA, some tribes expressed an interest in protecting wild rice for consumption and reeds for basket weaving. To help better protect those resources, EPA could include a narrative criterion that provides that water quality associated with certain designated uses be free from pollutants in amounts that prevent the growth of aquatic plants regularly harvested by tribes for cultural or traditional activities.

EPA seeks input on whether to include narrative criteria in any proposed federal baseline WQS and, if so, how best to approach the development of such criteria. Specifically, EPA solicits comment on the inclusion of the narrative criteria discussed above, particularly those intended to protect cultural and traditional uses, as well as other suggestions regarding how to protect a tribe's cultural and traditional practices.

In addition, EPA invites comments on how to establish a narrative criterion specifically intended for the protection of downstream waters. Pursuant to CWA sections 303 and 101(a), the federal regulation at 40 CFR 131.10(b) requires that "In designating uses of a water body and the appropriate criteria for those uses, the [s]tate shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." This provision requires states and authorized tribes, and EPA per 40 CFR 131.22(c), to consider and

ensure the attainment and maintenance of downstream WQS during the establishment of designated uses and water quality criteria in upstream waters.

EPA's current policy on downstream protection is described in a document entitled, *Protection of Downstream Waters in Water Quality Standards: Frequently Asked Questions* (June 2014) and includes descriptions of numeric and narrative approaches to ensure the maintenance and attainment of downstream WQS.¹⁷ Options to address downstream protection include, but are not limited to, downstream protection values developed in tandem with upstream criteria, use of water quality modeling to ensure upstream criteria are protective of downstream WQS, numeric criteria, and customized narratives. States and authorized tribes have reasonable discretion in choosing their preferred approach to downstream protection based on their individual circumstances. As described in that document, EPA has developed a set of four customizable templates¹⁸ for narrative downstream protection criteria to assist states and authorized tribes with developing a downstream protection narrative criterion. These templates may be used to develop a "broad narrative" criterion that provides basic legal coverage under 40 CFR 131.10(b) (*e.g.*, applies to all waters in the reservation) as well as a variety of "tailored narratives" that can be developed to address specific water bodies, pollutants, and/or water body types.

EPA invites comment on consideration of a downstream protection narrative criterion and seeks input on suggested narrative language, which may be informed through use of the customizable templates. EPA solicits any additional suggestions for other options.

2. Numeric water quality criteria

¹⁷ <https://nepis.epa.gov/Exe/ZyPDF.cgi/P100LIJF.PDF?Dockey=P100LIJF.PDF>

¹⁸ <https://www.epa.gov/wqs-tech/templates-narrative-downstream-protection-criteria-state-water-quality-standards>

As noted previously, in accordance with 40 CFR 131.11(b), states and authorized tribes, and EPA per 40 CFR 131.22(c), should establish numeric water quality criteria, unless numeric criteria cannot be established. At minimum, and as noted above, pursuant to CWA section 303(c)(2)(B), numeric water quality criteria must be established for the CWA section 307(a)(1) toxic pollutants.^{19, 20} For regulatory purposes, EPA has translated the 65 compounds and families of compounds listed under CWA section 307(a) (which potentially include thousands of specific compounds) into 126 specific toxic substances, which are often referred to as the “priority toxic pollutants.”

EPA seeks input on whether to establish numeric criteria for any federal baseline WQS for all parameters for which EPA has published CWA section 304(a) criteria recommendations, or for some other set of parameters. These include criteria recommendations for both priority toxic pollutants discussed previously as well as many other pollutants and parameters. EPA also invites comments on additional options to consider when establishing numeric criteria, as well as alternative approaches to numeric criteria that could help form the basis for any federal baseline WQS.

a. Aquatic life protection

For the federal baseline WQS effort, EPA could include numeric criteria for the protection of aquatic life for all pollutants for which EPA has published CWA section 304(a)(1) criteria recommendations. EPA has established recommended aquatic life criteria under CWA section 304(a) for 60 pollutants; for a full listing and description of these criteria see

¹⁹ The CWA section 307(a)(1) list of toxic pollutants is codified at 40 CFR 401.15.

²⁰ Where numeric criteria are not available for such priority toxic pollutants, CWA section 303(c)(2)(B) requires adoption of water quality criteria based on biological monitoring or assessment methods consistent with EPA guidance published pursuant to CWA section 304(a)(8).

<https://www.epa.gov/wqc/national-recommended-water-quality-criteria-aquatic-life-criteria-table>.²¹

Regarding criteria for temperature, EPA recognizes that temperature varies significantly, not only nationally but on a regional and local scale. For instance, temperature requirements for a warm water fishery differ from temperature requirements protective of a cold water fishery, and different stages of aquatic life may in turn need different protective WQS. The appropriate temperature WQS to protect aquatic life, therefore, may vary among and within reservations depending on the location of the reservations and the species endemic to the waters. Due to the broad applicability of the potential federal baseline WQS to Indian reservations across the United States, EPA is interested in obtaining comment on recommended approaches for addressing temperature that would be protective of the federally promulgated designated uses included in any potential federal baseline WQS rule. Specifically, EPA solicits comment on using a narrative temperature criterion to account for significant variability in temperature requirements of aquatic species in different regions, different water bodies, and different temperature sensitivities among species to protect and restore the natural thermal regime (spatial, temporal, seasonal, diurnal) that is protective of the most thermally sensitive species. The translation of this temperature narrative criterion would be conducted during CWA implementation (such as permit, assessment, TMDL programs) to protect the specific aquatic life uses at a site.

Similarly, the appropriate criteria for nutrients may vary among and within reservations depending on the location of the reservations. EPA invites comments on whether and how to include numeric and/or narrative nutrient criteria in any potential federal baseline WQS rule

²¹ These criteria were derived by EPA using its *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses*. <https://www.epa.gov/wqc/guidelines-deriving-numerical-national-water-quality-criteria-protection-aquatic-organisms-and>

given the resource implications in developing appropriate numeric nutrient criteria for such a large number of water bodies over such a broad geographic area. EPA solicits comment on other potential approaches to addressing nutrients in any potential federal baseline WQS rule.

EPA invites comments on the numeric aquatic life criteria that could be included in any potential federal baseline WQS rule. EPA also invites comments on additional options to consider when establishing numeric criteria for the protection of aquatic life, as well as alternative approaches to numeric criteria for the protection of aquatic life that could help form the basis for any federal baseline WQS.

b. Human health protection

For the federal baseline WQS effort, EPA could include numeric criteria for the protection of human health for all pollutants for which EPA has published CWA section 304(a) criteria recommendations. EPA has published recommended human health criteria under CWA section 304(a) for 122 pollutants; for a full listing and description of these criteria, see <https://www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table>.

To derive criteria for the protection of human health, EPA looks first to its 2000 Human Health Methodology.²² Human health criteria are based on two types of biological endpoints: (1) carcinogenicity and (2) systemic toxicity (*i.e.*, all adverse effects other than cancer). EPA takes an integrated approach and considers both cancer and non-cancer effects when deriving human health criteria. Where sufficient data are available, EPA derives criteria using both carcinogenic and non-carcinogenic toxicity endpoints and chooses the lower value. Human health criteria for

²² USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. EPA-822-B-00-004. <https://www.epa.gov/wqc/human-health-water-quality-criteria>.

carcinogenic effects are calculated using the following input parameters: cancer slope factor, cancer risk level, body weight, drinking water intake rate, fish consumption rate, and a bioaccumulation factor(s). Human health criteria for non-carcinogenic and nonlinear carcinogenic effects are calculated using a reference dose in place of a cancer slope factor and cancer risk level, as well as a relative source contribution, which is intended to ensure that an individual's total exposure from all sources does not exceed the criteria. Each of these inputs is discussed in more detail in this section and in EPA's 2000 Human Health Methodology.

As discussed in this section, EPA seeks additional comment on two of the human health criteria input parameters: the cancer risk level and the fish consumption rate, which may vary depending on policy decisions, other applicable federal laws, and data availability. EPA invites comments on the human health criteria that could be included in any federal baseline WQS rule. EPA also invites comments on alternative approaches to numeric criteria for the protection of human health that could help form the basis for any federal baseline WQS.

Cancer Risk Level

EPA's CWA section 304(a) national recommended human health criteria generally assume that carcinogenicity is a "non-threshold phenomenon," which means that there are no "safe" or "no-effect" levels because even extremely small doses are assumed to cause a finite increase in the incidence of cancer. Therefore, EPA calculates CWA section 304(a) human health criteria for carcinogenic effects as pollutant concentrations corresponding to lifetime increases in the risk of developing cancer.²³ EPA calculates its CWA section 304(a) human health criteria values at a 10^{-6} (one in one million) cancer risk level and recommends cancer risk

²³ As noted above, EPA recommends the criteria derived for non-carcinogenic effects if it is more protective (lower) than that derived for carcinogenic effects.

levels of 10^{-6} or 10^{-5} (one in one hundred thousand) for the general population. EPA notes that states and authorized tribes can also choose other risk levels, such as 10^{-7} (one in ten million), when deriving human health criteria.

If the pollutant is not considered to have the potential for causing cancer in humans (*i.e.*, systemic toxicants), EPA assumes that the pollutant has a threshold below which a physiological mechanism exists within living organisms to avoid or overcome the adverse effects of the pollutant.

For the federal baseline WQS effort, EPA could calculate human health criteria using the 10^{-6} (one in one million) cancer risk level to ensure that the resulting criteria are sufficiently protective and based on a sound scientific rationale. EPA invites comments on this approach and seeks input on other potential options, such as 10^{-5} or 10^{-7} .

Fish Consumption Rate

As noted previously, the fish consumption rate is one of the input parameters used to calculate human health criteria. EPA generally recommends selecting a fish consumption rate that is based upon local data and, where sufficient data are available, selecting a fish consumption rate that reflects consumption that is not suppressed by fish availability or concerns about the safety of available fish.²⁴ However, given the broad geographic scope of this potential federal baseline WQS rule, it could be challenging to identify reservation-, water-, or even region-specific fish consumption rates based on available data. EPA current thinking is to propose a more limited set of options to address fish consumption rate in any potential numeric

²⁴ USEPA. January 2013. *Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions*. <https://www.epa.gov/wqc/human-health-ambient-water-quality-criteria-and-fish-consumption-rates-frequently-asked>.

human health criteria that may be proposed as part of a federal baseline WQS regulation. Some potential options include:

- EPA's national default fish consumption rate of 22 g/day, which is a 90th percentile value found to be reasonable and adequately representative of the general population of fish consumers based on the 2003-2010 data from the National Health and Nutrition Examination Survey (NHANES).²⁵
- EPA's national default subsistence value of 142 g/day, representing subsistence fishers whose daily consumption is greater than the general population, as presented in EPA's 2000 Human Health Methodology.
- 160 g/day, which provides for half of the USDA's recommended daily protein intake from all sources to come from fish consumption (which would assume the other half would come from sources other than fish and shellfish).
- 175 g/day, the 95th percentile value of the data from surveyed tribal members in the Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs Tribes of the Columbia River Basin (Columbia River Inter-Tribal Fish Commission (CRITFC), 1994).²⁶

EPA could consider proposing an approach in which it assigns, as a default, human health criteria based on one of the four fish consumption rate options above to all reservations, and allow affected tribal governments, should they so request in comments, to select one of the other three options above for their reservations, based on any applicable rights reserved in treaties or

²⁵ EPA's national fish consumption rate is based on the total rate of consumption of fish and shellfish from inland and nearshore waters (including fish and shellfish from local, commercial, aquaculture, interstate, and international sources). USEPA. January 2013. *Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions*. <https://www.epa.gov/wqc/human-health-ambient-water-quality-criteria-and-fish-consumption-rates-frequently-asked>.

²⁶ Accounts for consumption of fish from inland and nearshore waters, as well as anadromous fish.

other federal law, and available data and information. In such a case, EPA could promulgate reservation-specific human health criteria based on one of the other three alternative fish consumption rates for such reservation(s). EPA invites comments this approach, as well as comments on additional options to consider when establishing numeric criteria for the protection of human health as part of the federal baseline WQS effort.

During consultation, EPA heard a number of tribes suggest that their own specific survey data be used in calculating the fish consumption rate for human health criteria for a specific reservation. EPA recognizes why such an approach may be attractive to tribes, but has concerns that attempting to provide individual, reservation-specific tailoring opportunities could present a very large workload that could substantially delay proposal and finalization of any federal baseline WQS effort. EPA notes that an alternative approach to fully tailor WQS to a particular reservation is through the TAS and WQS adoption processes. EPA requests comment on these considerations and how they should be addressed in any potential federal baseline WQS regulation.

E. What approaches should the potential federal baseline WQS take with regard to antidegradation requirements?

Maintaining high water quality is critical to supporting economic and community growth and sustainability. Protecting high water quality also provides a margin of safety that will afford the water body increased resilience to potential future stressors, including climate change. While preventing degradation and maintaining a reliable source of clean water involves costs, it can be more effective and efficient than investing in long-term restoration efforts or remedial actions. Antidegradation requirements are an essential component of WQS and play a critical role in maintaining and protecting the valuable water resources. Although designated uses and criteria

are the primary tools used to achieve the goals of the CWA, antidegradation requirements complement these by providing a framework for making decisions regarding changes in water quality. In the 1987 amendments to the CWA, Congress expressly affirmed the principle of antidegradation that is reflected in section 101 of the Act to “*maintain* the chemical, physical and biological integrity of the Nation’s waters.” In the 1987 amendments, Congress incorporated a reference to antidegradation policies in CWA section 303(d)(4)(B), thus confirming that an antidegradation policy is an integral part of the CWA and explaining the relationship between the antidegradation policies and other regulatory programs under the CWA.

The federal antidegradation regulation requires development and adoption of an “antidegradation policy” and development of “antidegradation implementation methods.” 40 CFR 131.12. The intent of an antidegradation policy is to ensure that in all cases, at a minimum: 1) water quality necessary to support existing uses is maintained; 2) that where water quality is better than the minimum level necessary to support protection and propagation of fish, shellfish and wildlife, and recreation in and on the water, that water quality is also maintained and protected unless, through a public process, some lowering of water quality is deemed to be necessary to accommodate important economic or social development in the area in which the water is located; and 3) waters identified as Outstanding National Resource Waters are protected. For the purposes of EPA’s national WQS regulation, “antidegradation policies” must be in rule or other legally binding form, and must be consistent with the requirements of 40 CFR 131.12(a). “Antidegradation implementation methods” refer to any additional documents and/or provisions developed by a state or authorized tribe, and EPA per 40 CFR 131.22(c), which describes methods for implementing its antidegradation policy, whether or not the state or authorized tribe formally adopts the methods in regulation or other legally binding form. EPA’s initial thinking is

that any proposed federal baseline WQS would include both an antidegradation policy and antidegradation implementation methods. EPA seeks input on establishing antidegradation requirements for any federal baseline WQS, whether antidegradation implementation methods should be included in rule, as well as alternative approaches that could help form the basis for any federal baseline WQS.

1. Antidegradation policy

The antidegradation policy provisions of any federal baseline WQS rule would have to be consistent with the federal antidegradation policy at 40 CFR 131.12(a).²⁷ Such provisions would establish baseline levels of water quality protection for Indian reservation waters, as required, by the CWA and federal WQS regulation. EPA notes that the language in any federal baseline WQS rule would need to be slightly different from 40 CFR 131.12(a) in order to make the policy easier to understand in the federal baseline WQS context.

When identifying high quality (or Tier 2) waters, EPA's initial thinking is that high quality waters could be identified, at the time a lowering of water quality is proposed, on a parameter-by-parameter basis. The national WQS regulation allows states and authorized tribes, and EPA per 40 CFR 131.22(c), to utilize either a parameter-by-parameter basis or a water body-by-water body basis to identify high quality waters (see 40 CFR 131.12(a)(2)(i)). Under the parameter-by parameter approach, states, authorized tribes (and EPA where necessary) determine whether water quality is better than the applicable criteria for a specific parameter or pollutant that would be affected by a new discharge or an increase in an existing discharge of the pollutant.

²⁷ 40 CFR 131.12(a) outlines the required contents of state and authorized tribal antidegradation policies; 40 CFR 131.22(c) makes clear that in promulgating WQS, EPA is subject to the same policies, procedures, analyses, and public participation requirements established for states and authorized tribe in the national WQS regulation (*e.g.*, the requirements at 40 CFR 131.12(a)).

For example, if zinc levels were 20 milligrams per liter (mg/L) and the applicable criterion was 120 mg/L, that water body would be a high quality water for zinc, but might not necessarily be high quality for another parameter. Determining which parameters are at a quality higher than necessary to support the CWA section 101(a)(2) uses is generally made at the time of a permit application for a new discharge or an increase in an existing discharge of the pollutant in question. The parameter-by-parameter basis is straightforward, may result in more Tier 2 protections being afforded to more waters, and lends itself to greater public transparency. EPA seeks input on identifying high quality waters using the parameter-by-parameter basis in any federal baseline WQS rulemaking.

EPA's initial thinking is that water bodies could be identified that are of exceptional recreational, ecological, or other significance (*e.g.*, Outstanding National Resource Waters). This provision would be consistent with 40 CFR 131.12(a)(3), and in effect, could establish the highest level of protection by prohibiting the lowering of water quality. Any proposed federal baseline WQS could outline a nomination process to identify Indian reservation waters that warrant protection as an Outstanding National Resource Water. Such a process could specify that any interested party may nominate a specific water for such protection and that the Regional Administrator, in consultation with the appropriate tribal government(s), will make the final decision to assign the water as an Outstanding National Resource Water. A decision to assign a water as an Outstanding National Resource Water is subject to the public participation requirements of 40 CFR Part 25, although a public hearing is not required.

EPA invites comments on the antidegradation policy outlined in this section and how this could be reflected in any potential federal baseline WQS proposal. EPA also seeks input on any

additional options to consider when establishing an antidegradation policy for any potential federal baseline WQS rule.

2. Antidegradation implementation methods

Consistent with 40 CFR 131.12(b), methods to implement the antidegradation policy must be developed, provide an opportunity for public involvement, and be made available to the public. While antidegradation implementation methods are not required to be contained in regulation, EPA is considering whether to include antidegradation implementation methods as a section of any proposed federal baseline WQS regulation. Because the antidegradation implementation methods would inform permit decisions and other implementation actions, EPA's current view is that for public transparency and for consistency in implementation, any federal baseline WQS effort should include antidegradation implementation methods in regulation. EPA invites comments on whether and how EPA could establish antidegradation implementation methods for any potential federal baseline WQS rulemaking. EPA also seeks input on any additional options to consider when establishing antidegradation implementation methods for any potential federal baseline WQS rule.

The WQS regulation at 40 CFR 131.12 does not specify minimum elements that must be included in antidegradation implementation, however, EPA provided a list of the areas that antidegradation implementation methods would need to address, at a minimum, to be consistent with the national WQS regulation (see 78 FR 58530, September 4, 2013). The list of minimum elements includes: (1) Scope and applicability; (2) Existing uses protection; (3) High quality water protection, including how high quality waters are to be identified, and the analyses and procedures that must be met to determine whether to allow a lowering of high quality waters; (4)

Outstanding National Resource Water protection; and (5) Thermal Discharges.²⁸ The federal baseline WQS effort could establish antidegradation implementation methods for each of these minimum elements.

EPA invites comments on the components and contents of the antidegradation implementation methods that could be established to meet the minimum elements, as well as any additional options to consider when establishing antidegradation implementation methods for any potential federal baseline WQS rule.

F. How could wetlands be addressed in the potential federal baseline WQS?

The national WQS regulation at 40 CFR 131.3(i) defines WQS as “provisions of [s]tate²⁹ or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. WQS are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.” Wetlands that are “waters of the United States” can be covered by federal WQS that help to provide a mechanism for their protection. A number of states have established WQS for wetlands, and EPA recently worked together with the Association of Clean Water Administrators to establish a template to assist states and authorized tribes in establishing narrative WQS for wetlands.

Wetlands often need specialized WQS because they have different functions and different vulnerability and wetland-specific WQS can provide robust protection for wetlands and their functions. Wetlands exist as ecosystems along the margins (land–sea, land–lake, land–river) and in depressional landscapes (*e.g.*, prairie potholes in the Midwest and kettle-hole wetlands in the

²⁸ EPA is not requesting comment on EPA’s interpretation of CWA section 316 or the implementing regulation at 40 CFR 124.66.

²⁹ EPA’s regulation, at 40 CFR 131.3(j), defines “state” to include the “50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible for purposes of the water quality standards program.”

northern United States). By season and location, wetlands experience variable water depth and velocity, soil type and saturation levels, vegetation, nutrient levels, sediment type, and oxygen demand, both within a given wetland and among wetland types.

EPA seeks comment on whether to include specific WQS provisions for the protection of wetlands WQS and, if so, suggestions for language, considerations, and approaches for doing so. Such wetland-specific WQS could include specific designated uses, narrative criteria, and antidegradation requirements developed from EPA's online template, see <https://www.epa.gov/wqs-tech/templates-developing-wetland-water-quality-standards>.

G. Which general provisions should be included in the potential federal baseline WQS?

As specified in 40 CFR 131.13 - 131.15, WQS can generally include certain discretionary policies that generally affect how WQS are applied or implemented. Most common among such provisions are those addressing mixing zones, compliance schedules authorizing provisions, and WQS variances. EPA requests input on whether it would be appropriate to include such provisions in any proposed federal baseline WQS regulation and, if so, which provisions and how they should be framed. EPA requests specific comment on inclusion of the following three WQS provisions that EPA is considering to ensure effective implementation of any potential federal baseline WQS proposal.

1. Mixing zone authorizing provision

Should EPA consider inclusion of a provision in the potential federal baseline WQS rule, if promulgated, to allow EPA to establish mixing zones in permitting scenarios on a case-by-case basis after consultation with the appropriate tribal government(s)?

EPA's guidance on mixing zones has been detailed in a number of Agency publications, including EPA's Water Quality Standards Handbook, Chapter 5, General Policies and the

Technical Support Document for Water Quality-based Toxics Control (TSD), March 1991, p33-34, 70-78.

EPA invites comments on whether to include a mixing zone authorizing provision in any potential federal baseline WQS rule, as well as any additional options to consider when establishing a mixing zone authorizing provision.

2. Compliance schedule authorizing provision

Should EPA consider inclusion of a compliance schedule authorizing provision in the potential federal baseline WQS rule, if promulgated, to allow compliance schedules to be included in NPDES permits on a case-by-case basis when appropriate after consultation with the appropriate tribal government(s)? Such authorizing provision would allow for compliance schedules to be included in NPDES permits to allow permittees additional time to achieve compliance with effluent limitations implementing the requirements of the CWA and applicable regulations.

By including such a provision, the potential federal baseline WQS would authorize EPA to include a compliance schedule, when appropriate and consistent with 40 CFR 122.47, in a NPDES permit for a new, recommencing or existing discharger to Indian reservation waters of the United States. Where it did so, the discharger to whom a permit was issued or reissued on or after the effective date of the final rule would have to comply with the permit limitations and requirements by the compliance schedule date. A new source or new discharger to Indian reservation waters of the United States would not be eligible for a compliance schedule unless it meets the requirements of 40 CFR 122.47(a)(2). If a new source or new discharger is not granted a compliance schedule, it must comply with any water quality-based effluent limitation in a permit issued on or after the effective date of the final rule upon commencing discharge. EPA invites comment on the inclusion of a compliance schedule authorizing provision as part of any potential federal baseline WQS rule, as well as any additional options to consider when establishing a compliance schedule authorizing provision.

3. WQS variance authorizing provision

Should EPA consider inclusion of a provision that would establish a process for EPA to issue WQS variances on a case-by-case basis after consultation with the appropriate tribal government(s)?

A WQS variance is a time-limited designated use and criterion (*i.e.*, interim requirements) that is targeted to a specific pollutant(s), source(s), and/or water body segment(s) that reflects the highest attainable condition during the specified time period. As such, a WQS variance requires a public process and EPA review and approval under CWA section 303(c). While the underlying designated use and criterion reflect what is ultimately attainable, the WQS variance reflects the highest attainable condition for a specific timeframe and is, therefore, less

stringent. The interim requirements specified in the WQS variance apply only for CWA section 402 permitting purposes and in issuing certifications under section 401 of the CWA for the pollutant(s), permittee(s), and /or water body or waterbody segment(s) covered by the WQS variance.

Such interim requirements may be adopted based on documentation demonstrating the need for a WQS variance consistent with 40 CFR 131.14(b)(2). Where the underlying designated use and criterion are not being met, WQS variances that reflect a less stringent, time-limited designated use and criterion would allow dischargers additional time to implement adaptive management approaches to improve water quality, but still retain the underlying designated use as a long term goal for the water body. WQS variances can apply to individual dischargers, multiple dischargers, and to entire water bodies or segments.

A WQS variance serves as the basis for the water quality-based effluent limit in NPDES permits. However, the interim requirements do not replace the underlying designated use and criteria for the water body as a whole for all CWA purposes. A WQS variance is designed to lead to improved water quality over the duration of the WQS variance and, in some cases, full attainment of designated uses due to advances in treatment technologies, control practices, or other changes in circumstances, thereby furthering the objectives of the CWA. For more information on WQS variances, please refer to EPA's final rulemaking to update the national WQS regulation.³⁰

EPA's current regulation allows for adoption of a WQS variance, consistent with 40 CFR 131.14, as part of a state or authorized tribe's WQS. EPA would consider establishing WQS

³⁰ 80 FR 51019, August 21, 2015. <https://www.gpo.gov/fdsys/pkg/FR-2015-08-21/pdf/2015-19821.pdf>.

variances to EPA's promulgated federal baseline designated uses and criteria on a case-by-case basis in consultation with tribes. Recognizing such tribes may have limited resources and minimal to no expertise with WQS development and administration, EPA could work in consultation with the affected tribal government(s) to assemble documentation to justify a WQS variance and meet the requirements of 40 CFR 131.14, as appropriate.

EPA invites comments on the inclusion of a WQS variance authorizing provision as outlined in this section, any additional options to consider when establishing a WQS variance provision for any potential federal baseline WQS rule, and on the implementation of the WQS variance provision.

H. Can tribes adopt WQS of their own?

In any final federal baseline WQS rule, EPA could include an explicit section to make clear that a tribe approved for TAS eligibility under CWA section 518 would continue to be able to adopt WQS of its own and submit them to EPA for approval, even after baseline WQS became effective. The tribe would need to apply to EPA for TAS to administer the WQS program. If EPA determines the tribe is eligible to administer the program, using the eligibility criteria and procedures in 40 CFR 131.8, then EPA would review the WQS adopted and submitted by the tribe to EPA. At that point, EPA reviews the submission under the process it regularly uses for tribes and states to ensure they are consistent with the requirements of the CWA and EPA's implementing regulation at 40 CFR part 131, and can approve in whole or in part.³¹ For any such WQS that are approved, the corresponding federal baseline WQS rule would no longer apply to

³¹ CWA section 303(c)(2) requires states and authorized tribes to submit new and revised WQS to EPA for review. EPA is required to review and approve or disapprove the WQS pursuant to CWA section 303(c)(3). EPA's goal is to work closely and collaboratively with states and authorized tribes throughout the WQS development and revision process.

such tribe's reservation waters because such waters would fall within the categories of waters excluded from any federal baseline WQS rule, namely reservation waters with CWA-effective WQS. Therefore, the federal baseline WQS would not affect a tribe's ability to apply to administer its own WQS program and adopt WQS under 40 CFR 131.8.

EPA invites comments on the inclusion of a section making clear that tribes, at any time, may seek TAS and, if approved by EPA, submit their own WQS for CWA purposes as outlined in this section.

IV. Statutory and Executive Order Review

A. Statutory and Executive Order Reviews

Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this is a "significant regulatory action" because the action raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action. Because this action does not propose or impose any requirements, and instead seeks comments and suggestions for the Agency to consider in possibly developing a subsequent proposed rule, the various statutes and Executive Orders that normally apply to rulemaking do not apply in this case. Should EPA subsequently determine to pursue a rulemaking, EPA will address the statutes and Executive Orders as applicable to that rulemaking.

B. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This ANPRM seeks input on key issues related to whether and how to fill the gap of WQS coverage in Indian reservation waters. In preparation for this ANPRM effort, EPA consulted and coordinated with tribal officials, consistent with EPA's Policy on Consultation and

Coordination with Indian tribes. EPA initiated consultation in the Fall of 2015, from August through November, and then continued consultation in the Summer of 2016, from June to August. During that time, EPA received considerable input from tribal officials, most of it supportive of this effort. The types of questions posed by tribal officials are reflected in this ANPRM for further discussion and public comment. EPA will continue to consult, coordinate, and engage tribes, to permit them to have meaningful and timely input into development of any potential federal baseline WQS rulemaking.

EPA invites comment from tribes on whether establishing federal baseline WQS is an appropriate step in advancing the federal trust responsibility to federally recognized tribes, and enhancing tribal government sovereignty through protection of reservation water quality. EPA is interested in any input regarding whether there are any concerns that would warrant not including a tribe in any final federal baseline WQS rule. While EPA is considering proposing to apply these WQS to all Indian reservations without CWA-effective WQS, in order to meet the goals of the CWA and better protect Indian reservation waters, EPA invites comment on other options.

List of Subjects in 40 CFR Part 131

Environmental protection, Indians-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: September 19, 2016.

Gina McCarthy,

Administrator.

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